No. 11701

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

M. A. WYMAN, doing business as M. A. Wyman Lumber Company, and M. A. WYMAN, M. H. WYMAN and EDWARD DORAN, doing business as the Wyman Mill Company, and M. A. WYMAN, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

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Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

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JURISDICTION

This was an action brought by the Administrator of Price Administration, against Appellants, alleging overcharges in the sale of lumber, in violation of Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050) and praying treble damages and injunctive relief. Jurisdiction of the District Court was claimed under Section 205(c) of the Emergency Price Control Act as amended in paragraph 2 of Count I, and paragraph 1 of Count II of the Second Amended Complaint.

Judgment was entered in this cause by the United States District Court for the Western District of Washington, Northern Division, October 1, 1946, denying injunctive relief, but awarding judgment against appellants and each of them, in the sum of $19,130.67 and costs. Motion for new trial was served and filed by these appellants October 7, 1946, and denied by minute entry June 23, 1947. The United States of America was substituted as plaintiff July 9, 1947, for the purpose of this appeal. Notice of Appeal by these appellants was filed July 14, 1947. Jurisdiction of this court upon appeal is invoked under Section 128 of the Judicial Code (28 U.S.C.A., Sec. 225).

STATEMENT OF THE CASE

The Office of Price Administration, hereafter referred to as appellee, filed the original summons and complaint herein, and summons was issued thereon July 11, 1945 (R. 2), seeking in four counts, injunctive relief and treble overcharges against appellants and Granite Falls Planing Mill, a corporation, in the sum of $62,347.83, for alleged violation of Revised Maximum Price Regulation 539 (10 Fed. Reg. 3224) a service regulation effective *March 31, 1945*, which fixes maximum prices for services performed in planing or surfacing lumber. Service of this summons and complaint was made on M. A. Wyman *only* (R. 11).

On November 7, 1945, nearly four months after the date of the issuance of the original summons, appellee filed a new summons and amended complaint

(R. 14) again charging a violation of Maximum Price Regulation 539 (9 Fed. Reg. 6152) between July 11 and December 22, 1944, and caused a new summons to issue on said date (R. 23) and on November 9, 1945, service of said summons and amended complaint was had on *M. H.* Wyman only, as an "individual" and as President of Granite Falls Planing Mill, a corporation (R. 24), and on November 20, 1945, service of said summons and amended complaint was had on Edward Doran only as an "individual" (R. 24). *This was the first service ever had on said corporation, M. H. Wyman or Edward Doran.*

The amended complaint contained only two counts. Count I, which sought injunctive relief, and Count II, treble overcharges (R. 14).

Motions were made by *all* the appellants to dismiss each of the two counts of the amended complaint on the ground that neither one stated a claim upon which relief could be granted (R. 32, 34).

The District Court, on February 15, 1946, granted appellants motions to dismiss Count II, the treble damage count, but denied the motions to dismiss Count I, the injunction count (R. 37).

Granite Falls Planing Mill, a corporation, M. H. Wyman and Edward Doran, also appeared specially, and filed motions supported by affiidavits, to quash the service of the summons, and amended complaint (R. 25, 28) on the ground that the action had abated as to them under local rule 15, which provides that an action "shall abate" as to any defendants not served within 90 days after the issuance of the sum-

mons, and on February 15, 1946, the District Court entered the following order dismissing Granite Falls Planing Mill, a corporation, M. H. Wyman and Edward Doran (R. 36):

> "It is therefore ORDERED and ADJUDGED that Granite Falls Planing Mill, a corporation, defendant above named, be and it is hereby dismissed from said suit.
>
> "It is further ORDERED and ADJUDGED that M. H. Wyman and Edward Doran, defendants above named, be and they are, hereby dismissed from said suit as individuals."

Now notwithstanding said order, appellee filed a new summons and second amended complaint February 27, 1946, which omitted Granite Falls Planing Mill, a corporation, and also omitted M. H. Wyman and Edward Doran individually as defendants, but included M. H. Wyman and Edward Doran as partners of Wyman Mill Company (R. 39), seeking in two counts injunctive relief and treble overcharges, this time in the sum of $57,392.57, and *changing the action* to an alleged violation of Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050), a commodity regulation, which fixes maximum prices for the sale of certain kinds of lumber. The second amended complaint alleged that these violations occurred between July 11 and December 22, 1944. The statute of limitations admittedly expired *December 22, 1945* (R. 62, 63).

Motions were made by *all* the appellants to dismiss the second amended complaint, on the ground, among others, that it constituted a new and different cause

of action, not served or filed within the time fixed by law (R. 49, 51).

M. H. Wyman and Edward Doran preserving their special appearance, also moved to quash the service of the summons and second amended complaint, on the ground that both had already been dismissed from this suit on February 15, 1946, and no appeal had been taken therefrom, and on the further ground that the action had abated as to them and could not be revived by an amended complaint (R. 46, 47). This motion was granted, and on August 12, 1946, the following order was entered (R. 55):

> "It is therefore ORDERED and ADJUDGED that the motions of M. H. Wyman and Edward Doran to quash the service of the summons and second amended complaint as to them in their individual capacity in the above cause, be and they are hereby granted."

The District Court, however, denied the said motions of appellants to dismiss (R. 57), but entered an order on August 12, 1946, dismissing said M. H. Wyman and Edward Doran "individually" but not "as to their partnership liability." In other words, the court seemed to hold that the action abated as to them individually, but not as partners.

The second amended complaint merely alleges that the defendants made numerous sales of lumber from July 11 to December 22, 1944, at prices in excess of Revised Maximum Price Regulation 26 (R. 39). *No fraud or deceit is alleged in any of the complaints.*

Appellants' answers deny the District Court's jurisdiction, and deny any violation of R.M.P.R. 26, and

plead affirmatively, a departure or change of the cause of action, after the expiration of the Statute of Limitations, estoppel and good faith (R. 58, 60).

Appellants at time of trial, but without waiving their right to object to certain testimony, entered into a written stipulation prepared by appellee (R. 62), which stipulation (para. 4) admits that the one-year statute of limitations expired December 22, 1945. The stipulation also admits (para. 3) that M.P.R. 539 is a service regulation, which fixes prices for *surfacing lumber*, and that R.M.P.R. 26 is a commodity regulation, which fixes prices for the *sale* of lumber.

The stipulation also admits (para. 11) that 3,122,-732 ft. of rough lumber sold and invoiced by M. A. Wyman, doing business as M. A. Wyman Lumber Co., for $89,427.38 during 1944 is "*in accordance with the prices set forth in R.M.P.R. 26.*" These invoices became plaintiff's Exhibit "1." The stipulation further admits (para. 12) that Granite Falls Planing Mill, a corporation, invoiced and received payment of $22,-955.44 for its services in surfacing this lumber. These invoices became plaintiff's Exhibit "2." This $22,-955.44, less cartage or trucking charges, which was waived by appellee (R. 179, 180), leaves, according to appellee's computation, $19,130.67, single the amount of alleged overcharges mentioned in the judgment (R. 73). Count I, the injunction count, was dismissed by the District Court at time of trial (R. 72, 250).

Mr. Rothfield, appellee's *only* witness concerning

overcharges, and whose testimony deserves scrutiny, stated that he was an investigator for the O.P.A. (R. 123). He admitted, however, that he had never seen or talked to any of appellants (R. 129, 130, 149, 153) and further admitted *that he knew nothing whatsoever about this case*, except as shown by the invoices (R. 129, 146, 147, 148, 149, 156, 157) brought to him by others (R. 129, 146, 153, 154) and certain "confidential information" (R. 156, 157) which latter he refused to divulge (R. 147, 148, 149, 156, 157). He also testified that he didn't even believe what the invoices showed (R. 163, 177, 179). Yet this witness was permitted over repeated objections (R. 104, 113, 120, 121, 122, 124, 129, 132, 133, 134, 140, 141 and 144) to state his conclusions based purely on hearsay and his imagination, that M. A. Wyman sold planed or surfaced lumber (R. 134, 135, 137, 138, 141, 142, 160, 162, 163, 164, 177 and 179) and that he used the Granite Falls Planing Mill, a corporation (which was long before dismissed from this suit) as a "dummy" to evade R.M.P.R. 26 (R. 160, 162, 163, 164 and 177) without *any facts* on which to base these conclusions. The conclusions of this witness were not only contradicted by the invoices introduced by appellee, but also by other witnesses produced by appellee (R. 115, 116, 209, 211, 213). This witness, however, did finally state *one* fact, and that is that no complaint had ever been made to the O.P.A. by any one, against either M. A. Wyman or Granite Falls Planing Mill (R. 157).

The attorneys for appellants and appellee have filed in the above entitled cause, for use on appeal,

the following additional stipulation, as to the contents of all of plaintiff's exhibits:

(U.S. Circuit Court of Appeals, Ninth Circuit, and Cause.)

"Stipulation Re Exhibits

"It is hereby stipulated and agreed by and between C. E. Hughes, attorney for appellants above named, and J. Charles Dennis and John E. Belcher, attorneys for appellee above named, that all of plaintiff's exhibits introduced in evidence at the trial of the above cause are described as follows:

"1. Plaintiff's Exhibit '1' consists only of invoices of rough lumber sold by M. A. Wyman d/b/a M. A. Wyman Lumber Company to his customers from July 10 to December 22, 1944, totalling 3,122,732 feet board measure for which said M. A. Wyman Lumber Co. received $89,427.38 in accordance with Revised Maximum Price Regulation 26. This Exhibit '1' covers the same transactions mentioned in paragraph 11 of stipulation. (R. 64)

"2. Plaintiff's Exhibit '2' consists only of invoices sent by Granite Falls Planing Mill, a corporation, to its customers for services performed by said corporation for surfacing 3,122,752 feet board measure of lumber for which said corporation received $22,955.44. This Exhibit '2' covers the same transactions mentioned in paragraph 12 of stipulation. (R. 64)

"3. Plaintiff's Exhibits '3' and '4' were not admitted in evidence.

"4. Plaintiff's Exhibit '5' consists only of bills of lading showing shipments of rough lumber by M. A. Wyman, d/b/a M. A. Wyman Lumber

Company to his customers, being the same lumber mentioned in plaintiff's Exhibit '1.'

"5. Plaintiff's Exhibit '6' consists only of figures showing calculation by appellee of alleged overcharges based on RMPR 26 which appellee claims establishes maximum prices for surfacing (planing) lumber, which calculation appellants claim is erroneous.

"6. Plaintiff's Exhibit '7' was not admitted in evidence.

"7. Plaintiff's Exhibit '8' consists only of letters from M. A. Wyman, d/b/a M. A. Wyman Lumber Co. to N. P. Ry. Co., enclosing bills of lading in accordance with instructions from the customers of said M. A. Wyman Lumber Co.

"8. Plaintiff's Exhibit '9' was not admitted in evidence.

"9. This stipulation is entered into to avoid the expense of printing said exhibits and to present the substance of said exhibits.

"DATED at Seattle, Washington, October 6, 1947.

C. E. HUGHES
Attorney for Appellants
J. CHARLES DENNIS
JOHN E. BELCHER
Attorneys for Appellee.

"Filed October 8, 1947."

It will be noted that *each* of the invoices comprising plaintiff's exhibit "1" contains this statement:

"This lumber delivered to Granite Falls, Planing Mill, Inc., as per your instructions to us, and to be milled and handled by them in accordance with your instructions to them." (R. 162)

It is also admitted that the prices charged in plaintiff's Exhibit "1" are correct (R. 135, 139).

It should also be noted here that appellee's Exhibit "2" has been mislabeled, "Copies Surfacing Invoices M. A. Wyman Lumber Co." The evidence and an inspection of this exhibit, however, together with the stipulation (R. 64) and the later stipulation dated October 6, 1947, clearly show that these invoices are Copies of Surfacing Invoices of *Granite Falls Planing Mill.*

Appellants' Exhibit "A-1" (R. 119) is a letter addressed to Granite Falls Planing Mill from its customer, directing it to perform certain planing services on lumber, and how to ship it. A similar letter covered *each* of the invoices mentioned in plaintiff's Exhibit "2" (R. 118).

Now these invoices, bills of lading and letters are regular and show no fraud. In fact the stipulation admits "That such procedure was customary at said time" (R. 65). Yet Mr. Rothfield concluded, admittedly *without any facts* that because M. A. Wyman was President of Granite Falls Planing Mill he used that corporation as a dummy in violation of R.M.P.R. 26 (R. 160, 162, 164, 177) even though these invoices, letters and bills of lading are regular, and the evidence is undisputed that this corporation never sold any lumber to *anyone* (R. 228, 229) also that appellants never sold any services for planing lumber (R. 229) also that M. A. Wyman never sold anything but rough lumber (R. 226) and that the customers of Granite Falls Planing Mill could have had these planing services done elsewhere (R. 226, 227).

M. A. Wyman was President of Granite Falls Plan-

ing Mill, a corporation, during 1944, but there is not a syllable of evidence that he ever had any connection with the alleged overcharges, or that he had anything to do with fixing any prices. Indeed the testimony of another witness for appellee, shows that M. A. Wyman had nothing whatsoever to do with the alleged overcharges and that he never planed or surfaced any lumber or sold any milling services to any one (R. 211), or ever fixed any prices (R. 213). The record is also barren of any evidence even tending to show a violation of any regulation by M. H. Wyman or Edward Doran.

This same biased and over-zealous witness, also testified that R.M.P.R. 26 (10 Fed. Reg. 13050) establishes maximum prices for *surfacing* (planing) lumber (R. 124, 125, 126, 151, 152, 165) and that his calculation of overcharges for services in planing lumber in the sum of $19,130.67 (plaintiff's Exhibit "6") is based on R.M.P.R. 26, Table 2 (R. 124, 130, 131, 132, 179, 180).

Now a mere reference to R.M.P.R. 26 (10 Fed. Reg. 13050) will show that this regulation nowhere establishes any prices for surfacing or services to lumber. All lumber services, including planing, are covered only by M.P.R. 539 (9 Fed. Reg. 6152). If it were otherwise, then M.P.R. 539, designed solely for services to lumber, would be useless. His calculation of overcharges in the sum of $19,130.67, is, therefore, erroneous. He should have used M.P.R. 539, tables 1 and 2, the regulation issued for that purpose and used by appellants.

Maximum Price Regulation 165 (9 Fed. Reg. 7439)

a service regulation, fixed prices for servicing lumber up to May 3, 1944, on which date Supplementary Service Regulation 27 to M.P.R. 165 (9. Fed. Reg. 4227) became effective, and on June 5, 1944, M.P.R. 539 (9 Fed. Reg. 6152) supplanted S.S.R. 27 to M. P.R. 165 (R. 69, 158, 159, 166, 170, 184, 185).

S.S.R. 27 to M.P.R. 165 and M.P.R. 539 are substantially the same (R. 186). The qualifying requirements of both are *exactly the same.* They both provide (Sec. 4(b)(2) I, II, III, IV) that even though a planing mill is owned, or partially owned or controlled by the same persons who operate a sawmlil, it (planing mill) may operate under these regulations (R. 169) if the O.P.A. *finds* from the application in substance that it (R. 174):

I. Will result in greater production of surfaced lumber.
II. Will not encourage sawmills to ship green lumber.
III. Will provide milling services that cannot be otherwise supplied.
IV. Will not result in increasing cost to consumer.

May 3, 1944, Granite Falls Planing Mill, a corporation, filed its application (defendants' Exhibit "A-2," R. 172) with the O.P.A. to operate under S.S.R. 27 to M.P.R. 165 (R. 183). This application was received the same day by Mr. Wurnsted, "Lumber Specialist," for the O.P.A. at Seattle (R.171, 183) who admittedly handled such applications (R. 187). He also admitted he told Mr. Wyman that he (Wurnsted) would look the planing mill over and see what could be done with the application (R. 189), because

he said the Government was in need of surfaced lumber for war and there were no other planing facilities in that district (R. 192). He and Mr. Rothfield both admitted that this application was *never investigated* (R. 175, 176, 177, 193), and that it laid on his desk (R. 194) and he did nothing about it until a year later, May 5, 1945, when he was finally ordered by the O.P.A. to return the application to Granite Falls Planing Mill, accompanied by a letter from him (defendants' Exhibit "A-3") (R. 195, 196, 197) in which he attempted to excuse his neglect by saying that the new regulation M.P.R. 539 "changed the qualifying requirements of S.S.R. 27 to M.P.R. 165."

Now it was bad enough to neglect this application for a year, *knowing* in the meantime that Granite Falls Planing Mill was operating under M.P.R. 539 (R. 203, 235) but his "excuse" that M. P. R. 539 "changed the qualifying requirements" of S.S.R. 27 to M.P.R. 165, is not only baseless, but *false*, because a reference to these two regulations will show that the qualifying requirements are exactly the same *verbatim.*

Mr. Wurnsted also claimed that since no time is fixed by the regulation to accept or reject an application, he had a right to keep it for a year before notifying the applicant (R. 203, 204), even though he knew during 1944, that Granite Falls Planing Mill was then operating under M.P.R. 539 and permitted it to so operate (R. 203), and didn't return the application or object to its operation until long after it had ceased to operate (R. 203).

He also claimed that even if the qualifying requirements of S.S.R. 27 to M.P.R. 165 and M.P.R. 539 were exactly the same (R. 235, 236) that the corporation should nevertheless have made a new application to operate under M.P.R. 539 (R. 194). We believe such a claim is super-technical. M.P.R. 539, Sec. 4(d) impliedly at least, refutes that contention.

Now the evidence is uncontradicted, and an investigation by the O.P.A. would have shown, that the applicant *qualified* under Sec. 4(b)(2) I, II, III and IV of M.P.R. 539 (R. 174, 234, 235, 237, 238) and was, therefore, entitled to charge the prices fixed by that regulation. Appellee also admits that no complaint was ever made against any of appellants by their *customers or anyone else* (R. 157), and it is undisputed that it would have cost the customer *more* than it did to have had any other planing mill perform the same services (R. 224, 239, 240). Therefore, admittedly *no one has been injured.*

SPECIFICATION OF ERRORS

1. The District Court erred in denying appellants' motions to dismiss this case, on the ground that appellee changed his cause of action, after the expiration of the Statute of Limitations (R. 57, 103, 106, 107, 108, 109, 217).

2. The District Court erred in adopting appellee's computation of overcharges based on the theory that Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050) fixed or established prices for *surfacing or planing lumber* (R. 124, 125, 126, 130, 131, 132, 143, 151, 152, 165, 179, 180).

3. The District Court erred in paragraph VI of its Findings of Fact (R. 67) and concluding as a matter of law that:

> "Defendants made numerous sales of Douglas Fir and other West Coast surfaced lumber between July 11, 1944, to and including December 22, 1944, to purchasers for use or consumption in the course of trade or business, at prices in excess of the maximum prices fixed by the Price Tables under Article V of R.M.P.R. 26."

4. The District Court erred in permitting over appellants' objections (R. 104, 113, 120, 121, 122, 124, 129, 132, 133, 134, 140, 141, 144) Mr. Rothfield, appellee's only witness, who claimed or sought to establish fraud, to merely state his conclusions that M. A. Wyman sold planed or surfaced lumber (R. 137, 138, 141, 142, 160, 162, 163, 164, 177, 179) and that he used Granite Falls Planing Mill, a corporation as a "dummy" to violate Revised Maximum Price Regulation 26 by trickery (R. 160 162, 163, 164, 177) and that M. A. Wyman and Granite Falls Planing Mill were one and the same person (R. 161, 162, 163, 177, 179), after this witness had admitted that he had never seen or talked to any of appellants (R. 129, 130, 149, 153) and after he had also admitted that he knew nothing whatsoever about this case, except as shown by the invoices (R. 129, 146, 147, 148, 149, 156, 157), which invoices contradict his testimony (Stipulation dated Oct. 6, 1947) on the ground that his testimony was only his conclusion or opinion, based on hearsay or his imagination, and not based on *any facts* shown by any testimony.

5. The District Court erred in Paragraph XVI of its Findings of Fact (R. 70) and concluding as a matter of law that:

> "Granite Falls Planing Mill was used for the purpose of securing prices in excess of the prices permitted the defendants by the provisions of the pricing tables under Article V of Revised Maximum Price Regulation 26."

6. The District Court erred in holding M. A. Wyman personally liable for any alleged dereliction of Granite Falls Planing Mill, a corporation, merely because he was an officer thereof.

7. The District Court erred in failing to conclude as a matter of law, that appellee was estopped to maintain this action by the course of conduct of his subordinates (R. 171, 172, 174, 183, 187, 194, 195, 196, 197, 203, 220, 221, 235, 236, 238, 239).

8. The District Court erred in awarding any judgment against M. H. Wyman or Edward Doran, after they had been dismissed from this action (R. 36) and no further action was taken until after the expiration of the Statute of Limitations (R. 39) and the evidence failed to connect either of them with the violation of any regulation.

9. The District Court erred in denying appellants' motions to dismiss this case at the close of appellee's testimony for failure of proof (R. 217, *et seq.*).

10. The District Court erred in awarding any judgment against these appellants (R. 72) and in failing to adjudge that the action should be dismissed.

11. The District Court erred in denying appel-

lants' motions for a new trial (R. 79) on the ground of surprise and failure of justice (R. 108, 109, 110, 111).

SUMMARY OF ARGUMENT

1. The second amended complaint filed and served after the statute of limitations had expired, changed the cause of action, from a violation of M.P.R. 539 to a violation of R.M.P.R. 26, requiring entirely different proof, and the evidence at trial further changed the cause of action by permitting hearsay testimony to establish fraud, when no fraud or deceit was alleged in any of the complaints.

2. The evidence failed to show that R.M.P.R. 26 fixes any prices for services performed in surfacing or planing lumber. This regulation only fixes the prices for the *sale* of rough, green or surfaced lumber. All lumber *services*, including planing, are covered only by M.P.R. 539.

It therefore follows, that appellee's calculation of overcharges (plaintiff's Exhibit 6) for planing lumber based on R.M.P.R. 26 is all wrong.

3. The evidence fails to sustain finding No. VI, that these appellants sold any surfaced lumber, or that they sold *any* lumber, except rough green lumber, which the stipulation admits is "in accordance with the prices set forth in R.M.P.R. 26." The Stipulation dated October 6, 1947 also confirms this statement.

4. Not one of the three complaints alleged any fraud or deceit, yet appellee's *only* witness who claimed any fraud, was permitted over repeated objections, to

state his conclusions, based on hearsay, that M. A. Wyman and Granite Falls Planing Mill, a corporation, long before dismissed from this suit, were one and the same person, and that M. A. Wyman used this corporation as a dummy, to violate R.M.P.R. 26, after this witness had admitted that he had no facts on which to base those conclusions, and in the face of the admitted fact that this corporation never sold any lumber to any one, and the further fact that appellee's own witness admitted that M. A. Wyman had nothing whatsoever to do with the alleged overcharges, and the further fact that the invoices introduced by appellee contradict those conclusions.

5. There is no evidence to sustain finding No. XVI that appellants used Granite Falls Planing Mill, a corporation, to violate R.M.P.R. 26, except the conclusion of one witness who admitted that he knew nothing about this case, except as shown by the invoices, which are admittedly regular.

6. The stipulation and evidence admit that appellee's Exhibit "1" complies with R.M.P.R. 26. The only other invoices in evidence, on which any overcharge could possibly be based is appellee's Exhibit "2," which shows that Granite Falls Planing Mill invoiced and received payment of $22,955.44 for surfacing charges, which fact the evidence and stipulations also admit.

Therefore *if* any overcharges were made, they were *made and received only by the corporation.* Even if the corporation were a party to this suit, which it is not, the mere fact that M. A. Wyman was President

of the corporation, would not make him personally liable, especially where appellee's own witness admitted that he had nothing whatsoever to do with the alleged overcharges.

7. An application was made by Granite Falls Planing Mill, a corporation, as provided by Regulation, which was duly received by the O.P.A. May 3, 1944, to operate under Supplementary Service Regulation 27 to M.P.R. 165 (9 Fed. Reg. 4227), which became M.P.R. 539 (9 Fed. Reg. 6152) on June 5, 1944.

The evidence is undisputed that this corporation was entitled to so operate, and did so operate until December 22, 1944. The O.P.A. kept this application for over a year without any investigation or action thereon, and finally returned the application on May 5, 1945, *knowing in the meantime* that the corporation was operating under M.P.R. 539, and their only "excuse" for this neglect was that M.P.R. 539 changed the qualifying requirements of S.S.R. 27 to M.P.R. 165, when, as a matter of fact, the qualifying requirements were the *same verbatim.* We believe such conduct amounts to an estoppel.

8. After the summons and amended complaint were filed, M. H. Wyman and Edward Doran were both dismissed from this suit on motion, by formal order of this court entered and filed February 15, 1946, on the ground that this action abated as to them October 10, 1945, under local Rule 15. The Statute of Limitations also admittedly expired December 22, 1945. The Second Amended Complaint was not filed until February 27, 1946.

Notwithstanding said order of dismissal, appellee made M. H. Wyman and Edward Doran defendants in the second amended complaint, and on August 12, 1946, an order was entered on motion, dismissing both of them "individually," but not "as to their partnership liability."

Now if the action abated as to them it would seem that all rights thereunder as to them, likewise abated. In any event the filing and service of the second amended complaint was admittedly made after the expiration of the statute of limitations.

9. The pleadings and evidence in this case show a complete change of the cause of action, after the expiration of the statute of limitations. The evidence also shows that appellee claimed that R.M.P.R. 26, table 2, establishes maximum prices for surfacing or planing lumber and his calculation of the alleged overcharges is based on R. M. P. R. 26, table 2. R.M.P.R. 26 nowhere fixes the prices for surfacing or planing lumber. The prices for surfacing or planing lumber are covered only by M.P.R. 539. Hence appellee's calculation of overcharge for *planing* lumber based on R.M.P.R. 26, is all wrong.

The evidence fails to show that appellants sold any lumber, except green, rough lumber, which both stipulations admit is in accordance with R.M.P.R. 26.

The evidence also fails to show that M. A. Wyman had anything to do with any alleged overcharges.

The evidence also shows that appellee should be estopped by the course of conduct of his subordinates.

The pleadings and evidence also show that this

action abated as to M. H. Wyman and Edward Doran, October 10, 1945, and they were formally dismissed February 15, 1946. The statute of limitations expired December 22, 1945, and the second amended complaint was not filed until February 27, 1946.

We also believe the trial court abused its discretion, in permitting appellee to surprise appellants, by changing the issues without notice at the time of trial, resulting in a failure of justice to appellants, and that appellants are entitled at least to a new trial.

ARGUMENT OF THE CASE

I.

Pleadings and Evidence Show Change of Cause of Action

The first two complaints (R. 2, 14) alleged that Granite Falls Planing Mill, a corporation, was the only defendant engaged in planing or services to lumber, but sought treble overcharges against *all* the defendants for alleged violation of Maximum Price Regulation 539 (10 Fed. Reg. 3224 and 9 Fed. Reg. 6152).

The Second Amended Complaint, filed and served after the statute of limitations had expired (R. 39) changed the cause of action from a violation of M.P.R. 539, a service regulation, to Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050), a commodity regulation, and introduced a new and different cause of action, based on a different wrong and requiring entirely different proof.

Motions were made by all the appellants before an-

swering (R. 49, 51) and at the close of appellees' testimony (R. 217) to dismiss this case, on the ground that the second amended complaint changed the cause of action, after the expiration of the statute of limitations. These motions, however, were denied (R. 57, 221). 50 U.S.C.A., Sec. 925(e) provides, that the Administrator must bring this action "within one year from the date of the occurrence of the violation." The violations allegedly occurred between July 11 and December 22, 1944 (R. 41). The statute of limitations admittedly expired December 22, 1945 (R. 62, 63). The second amended complaint was not filed until February 27, 1946 (R. 43).

The test applied by most courts to determine whether or not a cause of action has been changed is—Does it require substantially different or additional testimony? If it does, then the cause of action has been changed.

The following is a partial list of authorities upholding this test:

Salyers v. U.S. (C.C.A. 8, 1919) 257 Fed. 255;

Kunselman v. Sou. Ry Co. (Ariz., 1928) 263 Pac. 939;

Stowe v. May (Mich., 1929) 226 N.W. 237;

Humphries v. McAuley (Ind., 1933) 187 N. E. 262;

Arrowood v. Delaney's Est. (Mo., 1927) 295 S.W. 522;

29 A.L.R. 636;

21 R.C.L. 583;

31 Cyc. 418.

Now manifestly proof of violation of R.M.P.R. 26, a commodity regulation, which fixes prices only for the sale of lumber, requires entirely different proof than does proof of violation of M.P.R. 539, a service regulation, which fixes prices only for services performed in surfacing lumber. The bases of the two wrongs are different and their essential elements are different. True, both regulations came under the Emergency Price Control Act, and so did for instance, sugar, rent and shingles. Certainly appellee cannot contend that a complaint under any one of those three items may be amended to charge either of the other two, after the statute of limitations has expired.

In *Union Pacific Ry. v. Wyler* (1895) 158 U.S. 285, 39 L. ed. 983, which has been cited many times with approval, the court, speaking through Mr. Justice White, in discussing this question, said:

> "A departure may be either in substance of the action, or the law on which it is founded * * *
>
> "The latitude of amendment allowed the plaintiff cannot be permitted to work injustice to the defendant, or to deprive him of any just and rightful defense. The plaintiff may introduce a new cause of action by amendment, but such amendment cannot have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate as a bar to a new suit commenced for that cause of action, at the time of making the amendment."

In *Whalen v. Gordon* (C.C.A. 8, 1899) 95 Fed. 305, plaintiff brought an action to recover damages for breach of warranty, and after the statute of limita-

tions had run, he amended his complaint to recover as for a rescission of contract. Judge Sanborn, in a very exhaustive opinion, held that the amendment did not relate back to the beginning of the action, as to stop the running of the statute,

See also:

U.S. v. Norton (C.C.A. 5, 1901) 107 Fed. 412;

Walker v. Ia. Ry. Co. (D.C. Ia., 1917) 241 Fed. 395;

Ronald Press Co. v. Shea (D.C., N.Y., 1939) 27 F. Supp. 857;

Walker v. Hester (Kan., 1900) 59 Pac. 662;

Mer. Nat. Bank v. Bentel (Calif., 1913) 137 Pac. 25.

In *Whitman Const. Co. v. Remer* (C.C.A. 10, 1939) 105 F(2d) 371, where an amended complaint was filed after statute of limitations had run, introducing a different cause of action, the court held that the New Federal Rules of Civil Procedure does not permit an amendment which introduces a different cause of action, after the bar of the statute of limitations.

See also:

Schwartz v. Met. Ins. Co. (D.C., Mass. 1941) 2 F.R.D. 167.

The evidence at trial further changed the original and amended complaints by attempting to show fraud (R. 160, 162, 163, 164, 177, 179) when no fraud or deceit was alleged in *any* of the complaints.

We concede that the New Federal Rules of Civil Procedure have liberalized pleadings, but as the visiting trial judge remarked (R. 108):

> "This thing of filing a Mother Hubbard pleading, and coming in and proving anything that is in the mind of the plaintiff, that shall not be tolerated by the courts, because that is resorting to trickery, and courts are not established for that purpose."

We are satisfied that if fraud had been alleged in the second amended complaint, the trial court would have dismissed this case before trial. Yet the court permitted appellee to accomplish his purpose indirectly, by not only changing his cause of action, but by attempting also to show fraud, when none was alleged.

Furthermore, appellee has never yet asked the Court to permit him to amend his pleadings to show fraud. Nor do we believe the trial court would have permitted him to do so under the issues in this case.

II.

R.M.P.R. 26 Fixes No Prices for Services to Lumber

Mr. Rothfield, appellee's only witness, concerning overcharges, testified that "Revised Maximum Price Regulation 26 establishes maximum prices for surfacing (planing) lumber" (R. 124, 125, 126, 151, 152, 165) and that his calculations of $19,130.67 overcharges for services in *planing* this lumber is based on R.M.P.R. 26, table 2 (R. 124, 130, 131, 132, 179, 180).

We believe the trial court was misled by these two statements, because a reference to R.M.P.R. 26 will show that it no where fixes any prices for surfacing or services to lumber. All lumber services, including

planing, are covered *only* by Maximum Price Regulation 539. *We challenge counsel to disprove that statement.*

Therefore, appellee's calculation of the overcharges are all wrong, because he should have used M.P.R. 539, tables 1 and 2, the regulation issued for that purpose, and used by appellants.

III.

No Evidence That Appellants Sold Any Surfaced Lumber

The trial court's finding No. VI is as follows (R. 67):

> "Defendants made numerous sales of Douglas Fir and other West Coast surfaced lumber between July 11, 1944, to and including December 22, 1944 * * * in excess of the maximum prices fixed by the Price Tables under Article V of R.M.P.R. 26."

Article V, Table 2, of said regulation fixes the prices for the sale of rough, green and surfaced lumber *only*.

Now, the only evidence of any sales of lumber by any of appellants is plaintiff's Exhibit "1." This exhibit and evidence show sales of only rough, green lumber by M. A. Wyman Lumber Co., to his customers, for which the M. A. Wyman Lumber Co. received $89,427.38. The evidence and stipulation both admit that these sales were in accordance with the prices set forth in R.M.P.R. 26.

The stipulations and evidence also admit that Granite Falls Planing Mill, a corporation, invoiced and received payment of $22,955.44 for surfacing charges.

Now *if* there is a violation of any regulation, it can be only by this corporation, which was dismissed from this suit before trial, and since this corporation admittedly sold no lumber, it cannot be in violation of R.M.P.R. 26. When this corporation was dismissed from this suit, this action should then have been dismissed.

IV.

Hearsay and Conclusions of Witness Inadmissible

It will be remembered that none of the complaints alleged any fraud or deceit. Therefore, under the issues in this case any evidence or conclusions of fraud or trickery was inadmissible, not only because it made a further change in the cause of action after the statute of limitations had run, but because it was outside the issues in the case.

Where a judgment is based on fraud, through the testimony of *one* witness, who admits on the witness stand, that he knows nothing about the case, except as shown by the invoices, which appear regular, and is permitted over repeated objections to state merely his conclusions, based purely on hearsay or imagination, which even contradict the very invoices produced by him, as was done in this case, we don't believe this court will permit such a judgment to stand.

A reference to Mr. Rothfield's testimony will show him as an "O.P.A. crusader" whose sole aim was the conviction of M. A. Wyman.

He testified over repeated objections (R. 104, 113, 120, 121, 122, 124, 129, 132, 133, 134, 140, 141, 144) that M. A. Wyman used the Granite Falls Planing

Mill, a corporation, as a dummy, to evade R.M.P.R. 26 (R. 160, 162, 163, 164, 177) and that M. A. Wyman and Granite Falls Planing Mill were one and the same person and that M. A. Wyman sold surfaced lumber (R. 134, 135, 137, 138, 141, 162, 163, 164, 177, 179), but he finally admitted that he had never talked to any of appellants (R. 129, 130, 149, 153) and that he knew *no facts* upon which to base these conclusions (R. 129, 146, 147, 148, 149, 156, 157). In other words, he attempted to convert the plain words of the invoices into fraud, admittedly without any facts. His evasion and insincerity are clearly shown in the record on pages 146, 147, 148, 149 and 175, 176, 177.

We confidently believe the trial court erred in relying upon, or even permitting such testimony.

The further fact, that the trial court dismissed Count I,—the injunction count—(R. 72) and awarded judgment for only single the amount of alleged overcharges (R. 72, 249) would indicate the absence of any fraud.

V.

No Evidence Granite Falls Planing Mill Was Used to Violate R.M.P.R. 26

The trial court's finding No. XVI (R. 70), which is really a conclusion, is as follows:

> "* * * The Granite Falls Planing Mill was used for the purpose of securing prices in excess of the prices permitted the defendants by the provisions of the Pricing Tables under Article V of Revised Maximum Price Regulation 26."

There was no evidence to sustain that finding.

True, M. A. Wyman, M. H. Wyman and Edward Doran owned stock in Granite Falls Planing Mill, a corporation, but how, or in what way this corporation was used or could be used to violate R.M.P.R. 26 is not shown, either by the findings or evidence, because this corporation admittedly *never sold any lumber.*

Both the invoices and stipulations show that this corporation only surfaced lumber, for which it alone invoiced and received payment (R. 64). Therefore, the corporation could not be used to violate R.M.P.R. 26.

VI.

Officer of Corporation Not Personally Liable for Acts of Corporation

The burden of proving M. A. Wyman's connection with the alleged overcharges is placed entirely upon appellee. The only evidence tending to connect M. A. Wyman, if it may be called evidence, is the conclusion of Mr. Rothfield, admittedly based on hearsay only, and without any investigation (R. 129, 146, 147, 148, 149, 156, 157), that M. A. Wyman used the Granite Falls Planing Mill, a corporation, for trickery and evasion (R. 160, 162, 163, 164, 177). This witness *merely assumed* that because M. A. Wyman was President of Granite Falls Planing Mill, a corporation, he knew all about the alleged overcharges made by that corporation, in spite of the invoices and the positive testimony of appellee's other witness, that M. A. Wyman had nothing whatsoever to do with the alleged overcharges (R. 115, 116, 209, 211, 212, 213).

M. A. Wyman cannot be held personally liable for

any dereliction of Granite Falls Planing Mill merely because he happened to be President of that corporation, especially since the corporation is not a party to this suit.

In *Briggs v. Spaulding* (1891) 141 U.S. 132, 35 L. ed. 663, which was an action for damages against the officers of a corporation, Mr. Chief Justice Fuller, in discussing this question said (p. 146):

> "The performance of acts which are illegal or prohibited by law, may subject the corporation to a forfeiture of its franchise, and the directors to criminal liability, *but this would not render them civilly liable for damages.*" (Italics ours)

See also:

Barry v. Legler (C.C.A. 8, 1930) 39 F.(2d) 297;

Folwell v. Miller (C.C.A. 2, 1906) 145 Fed. 495.

Fletcher Cyc. Corp. (Per. Ed.) Vol. 3, Sec. 1024:

> "If acts are expressly prohibited by the charter or a statute, but liability for violation thereof is not imposed on corporate officers by the charter or statute, the doing of such an act, does not make the officers personally liable merely because the act is in violation of the charter or statute."

See also:

Sow Thrift Co. v. Rairdon (Cal. 1941) 118 P.(2d) 828;

Kiel v. Frank Shoe Co. (Wisc. 1944) 14 N.W.(2d) 164;

Kulesza v. Chicago News (Ill. 1941) 35 N.E.(2d) 517;

Beeler v. Riling (Kan. 1931) 296 Pac. 365;

Darling v. Fry (Mo. 1930) 24 S.W.(2d) 722;

McGuire v. La. Baptist Encamp. (La. 1940) 199 So. 192;

19 C.J.S. 272.

Neither the Emergency Price Control Act (50 U.S.C.A., Sec. 925), nor the regulation, makes any *officers* of a corporation personally liable in money damages. The Act makes the "seller" liable for money damages, but not the agent of the seller. The stipulations admit that Granite Falls Planing Mill invoiced and received payment of the alleged overcharges. Therefore it is admittedly the "seller," and the only one liable.

In the late case of *Cochran v. Nelson* (Wash. 1946) 173 P.(2d) 769, which was an action against the agent of the seller to recover treble overcharges under the Emergency Price Control Act, the court discussed this question at length, and quoted with approval *Bowles v. Cardinal Cutlery Corp.*, decided Jan. 28, 1946 by the U. S. District Court in which both courts held that:

> "An officer of the corporation is not the seller, even though he may fix an illegal price and personally negotiates the sale. The acts of the salesman or the officer may constitute a violation of the Price Regulation, for which he may be prosecuted under Sec. 205(b) or enjoined under 205(a). He is punished or enjoined because he is a violator. But because he is not the "seller" he is not liable in money damages under 205(e)."

There is still another reason why M. A. Wyman

cannot be held personally liable for the acts of the corporation. We realize that courts will pierce the "corporate veil," but will do so only when the corporation is a party defendant. Especially where it is admitted by stipulations that the corporation received the alleged overcharges. Because the corporation that received the money is primarily liable, and judgment must therefore first be obtained against the corporation.

Swan Land Co. v. Frank (U.S. Cir. Court Ill. 1889) 39 Fed. 456, was an action to recover damages against the officers of two corporations on the ground that the officers had possession of certain assets of these corporations. The corporations were not made parties defendant. The District Court sustained a demurrer to the complaint and dismissed the action, because the corporations were necessary parties defendant, and the U. S. Supreme Court in *Swan Land Co. v. Frank*, (1893) 148 U.S. 603; 37 L. ed. 577, in affirming the decision of the District Court said:

> "Now it is too clear to admit of discussion, that the various corporations charged with fraud which has resulted in damage to the complainant, are necessary and indispensable parties to any suit to establish the alleged fraud, and to determine the damages arising therefrom. Unless made parties to the proceeding in which these matters are to be passed upon and adjudicated, neither they, nor the other stockholders would be concluded by the decree."

One may easily imagine a case where a disgruntled stockholder may cause some third person to sue the President of the corporation alone, for some derelic-

tion of the corporation, and thus according to appellee's theory the corporation could escape liability.

The reason the corporation is not a party to this suit, and the only reason is, that it has been dismissed (R. 36) and cannot be made a party.

VII.

Estoppel

We believe Mr. Wurnsted the "Lumber Specialist" for the O.P.A. at Seattle, who admittedly received the application of Granite Falls Planing Mill May 3, 1944 (R. 172, 183, 186) made in good faith to operate under Supplementary Service Reg. 27 to M.P.R. 165 (9 Fed. Reg. 4227) which became Maximum Price Regulation 539 (9 Fed. Reg. 6152) on June 5, 1944 (R. 184), and who did nothing about the application for over a year (R. 194, 195) and after it had ceased operation (R. 197, 199) he returned the application on May 5, 1945 (R. 196, 197) *knowing* in the meantime that this corporation was operating under M.P.R. 539 (R. 203, 235), amounts to an *estoppel.* And this estoppel is fortified, by Mr. Wurnsted's letter returning the application (R. 195, 196, 197) wherein he says that M.P.R. 539, superseding S.S.R. 27 to M.P.R. 165, "changed the qualifying requirements," when as a matter of fact a comparison of these two regulations will show, that the qualifying requirements were both the same *verbatim.* This estoppel is further fortified by the fact that he admittedly made no investigation (R. 175, 176, 177, 193, 194) although the evidence is undisputed that an investigation would have shown that Granite Falls Plan-

ing Mill was *qualified and entitled* to operate under S.S.R. 27 to M.P.R. 165 and M.P.R. 539 (R. 174, 234, 235, 237, 238).

Certainly a private individual could not hope to recover damages under the above facts, nor should an agency of the Government expect more.

In *U. S. v. Denver R. G. Ry.* (C.C.A. 8, 1926) 16 F.(2d) 374, which was a suit by the United States to forfeit a right-of-way, because of non-user, the court in discussion the question of estopel said:

> "The equitable claims of the State or of the U. S. are no stronger than those of an individual under like circumstances, and a state or the U. S. may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim."

The estoppel in this case, is not one involving the construction of a regulation, but is one involving the application of the Golden Rule to the everyday affairs of men, based entirely on honesty and fair dealing.

VIII.

M. H. Wyman and Edward Doran Not Liable in Any Event

M. H. Wyman and Edward Doran were both ordered dismissed from this suit on February 15, 1946, on the ground that the action had abated as to them (R. 36). Notwithstanding this order, the O.P.A. filed a second amended complaint on February 27, 1946 (R. 39) after the statute of limitations had expired, making both of them parties defendant, and

judgment was entered "against the defendants and each of them in the sum of $19,130.67" (R. 72).

This judgment, of course is controlling, and under it execution may be had against anyone of the defendants for the full amount, notwithstanding the statement of the trial judge that "No court would let such an execution stand" (R. 258).

Now since this action abated as to these two defendants, all rights against them likewise abated, which cannot be cured by amendment.

The abatement of an action is the entire overthrow or destruction of the suit. To sustain the plea is a dismissal of the suit.

Sweeney v. Greenwood Index Co. (D.C.S.C. 1941) 37 F. Supp. 484;

Geiger v. Merle (Ill. 1935) 196 N.E. 497;

In re Thomasson (Mo. 1942) 159 S.W.(2d) 626;

1 C.J.S. 29;

49 C.J. 244.

The trial court *seemed* to hold that service of a copy of the *original summons and complaint* on M. A. Wyman on July 13, 1944 was sufficient service on M. H. Wyman and Edward Doran the other two members of the partnership of Wyman Mill Co. We do not agree with that holding.

"A partnership does not exist in law apart from the individuals composing it."

Yarbrough v. Pugh (1911) 63 Wash. 140, 114 Pac. 918;

"It is a settled rule that in order to sue a

partnership each partner must be personally served with process."

Duncan v. Pearson (D.C., S.C., 1940) 35 F. Supp. 631;

Duncan v. Pearson (C.C.A. 4, 1943) 135 F. (2d) 146;

In re Gayle (C.C.A. 5, 1943) 136 F.(2d) 973;

Coughlin v. Pinkerton (1906) 41 Wash. 500, 84 Pac. 14.

The abatement of this suit as to M. H. Wyman and Edward Doran (R. 36) ended this action as to them in *every* capacity, and subsequent service on February 27, 1946 (R. 45) could not revive it.

Even if such service were effectual to hold M. H. Wyman and Edward Doran, the statute of limitations intervened in the meantime.

Nor was there any evidence even *remotely* connecting M. H. Wyman or Edward Doran with the violation of *any* regulation.

IX.

Appellants Motion for Non-Suit or Dissmissal or New Trial Should Have Been Granted

We believe the pleadings and evidence together with the stipulations show:

1. That appellee changed the Cause of Action after the expiration of the one-year statute of limitations.

2. That appellee's figures of $19,130.67 are erroneous.

3. That there is no evidence that appellants sold

any surfaced lumber or any other lumber, except rough lumber, which the evidence and stipulation both admit are in accordance with R.M.P.R. 26.

4. That the only testimony of fraud or overcharges by appellants, is the conclusion of *one* witness based solely on his imagination and admittedly without any facts.

5. That there is no evidence that appellants used Granite Falls Planing Mill to violate R.M.P.R. 26.

6. That appellee has failed to connect M. A. Wyman with the sale of any surfaced lumber.

7. That the evidence amounts to an estoppel against appellee.

8. That M. H. Wyman and Edward Doran were dismissed from this suit before trial, and the second amended complaint was not filed until after the expiration of the Statute of Limitations, and there is no evidence of the violation of any regulation by either of them.

For these reasons and the additional admitted facts, that no complaint was ever made by any of appellant's customers, or *any one else*, and the further fact that it would have cost the customer *more* than it did to have had this lumber planed elsewhere, and therefore no one has been injured; we believe the District Court erred in denying appellants' motions to dismiss the case at the close of appellees' testimony, and in failing to dismiss this case at the conclusion of the trial.

In fairness to the visiting trial judge, he let it be

known at the outset of the trial that he knew nothing about lumber (R. 115) and we believe because of that fact, he was grossly misled by the conclusions of Mr. Rothfield. The trial judge also stated at the conclusion of the trial, when he announced judgment against appellants in the sum of $19,130.67, single the amount of the overcharges:

> "If the Court could, it would render a judgment for a less amount of damages." (R. 249).

This statement, we believe, dispels any idea of fraud.

Briefs for and against motions for new trial were submitted November 9, 1946, and a minute entry of the denial of these motions was not made until June 23, 1947 (R. 79).

These facts are merely mentioned to show that apparently the trial judge was not thoroughly convinced of the propriety of the judgment, or of his denial of appellants' motions for a new trial.

The following excerpt from the record (R. 109, 110, 111) we believe also shows surprise which ordinary prudence by appellants could not have guarded against:

> THE COURT: The thing I want to know is this: The Second Amended Complaint charges you with the sale of lumber beyond the ceiling price—in excess of the ceiling price. It doesn't say how you did it, it doesn't indicate how you did it.
>
> Now are you caught by surprise or are you not, when they offer to prove that your clients manipulated this thing through Granite Falls Planing Mill and thereby raised the price of lumber?

MR. HUGHES: Well, I will say this Your Honor, the last day or two I have been trying to figure out how they were going to prove it.

THE COURT: Did they ever tell you how they were going to prove it?

MR. HUGHES: No that was never gone into—how they were going to prove it.

THE COURT: I see nothing in this record that indicates that you were informed by any of the record. You came in and asked them to make that more definite and certain. Judge Bowen denied that promptly, and gave you your right of discovery—that you could pursue. If you were caught by surprise, if you didn't know that that was to be their method of proof, this Court will not permit them to prove it. In other words, if by this overall complaint, they have got you in here and you didn't know what the cause was, and if you would have filed a different answer in the action had you known that, the Court will not permit them to do it. Now if you had known that would you have filed a different answer from that which you did file?

MR. HUGHES: Why I think I would Your Honor. I would have to think it over, but I don't see how I could get by with the Answer I filed in the case and meet such a charge."

Now of course appellants' right to a discovery, could not possibly have elicted the fact that appellee intended to prove fraud at trial. Nor were appellants under any obligation to inquire of appellee how he intended to prove his case.

If the issues made up for the trial of a case are permitted to be radically changed at time of trial

without notice, then the pleadings become useless. The trial court as shown by the record permitted such a change, and in so doing, we believe it arbitrarily abused its discretion, resulting in a failure of justice to appellants.

It is, therefore, respectfully submitted, that the District Court erred in the respects pointed out herein, and the judgment should, therefore, be reversed.

Respectfully submitted,

C. E. HUGHES,
Attorney for Appellants.